STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2005
v	No. 255239 Oakland Circuit Court
MARK THOMAS HENTSCHEL, Defendant-Appellant.	LC No. 2003-192708-FH

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

A jury convicted defendant of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), and the court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to a prison term of forty-six to 180 months. He appeals as of right. We affirm defendant's conviction, but remand for resentencing.

I. Underlying Facts

Defendant was convicted of sexually assaulting the fifteen-year-old victim. Defendant was thirty-one years old at the time of the offense. The victim testified that when she met defendant in September 2003, at the fast food restaurant where he was employed, she told him her age. Defendant allegedly told her that he was eighteen years old and in a band. Defendant also took a picture of the victim with his cell phone. Over the next "few days," defendant and the victim communicated by instant messaging via computers.[1] Defendant subsequently gave the victim a music CD and his cell phone number. The victim called defendant and the two arranged to meet at the victim's house. On September 14 or 15, 2003, at about 10:30 p.m., defendant came to the victim's house, and the victim's fourteen-year-old sister opened the backdoor for defendant. The victim's sister confirmed that she opened the door for defendant and escorted him to the victim's upstairs bedroom.

[1] At the time of the offense, defendant was on parole for a prior conviction of third-degree CSC (victim between thirteen and fifteen). The conditions of defendant's parole prohibited him from, inter alia, having contact with "any child 16 years of age or younger," and using "any computer or any device capable of connecting to the Internet either directly or indirectly."

The victim testified that she and defendant sat on her bed, "talked about sex," and eventually removed their clothing. Defendant touched the victim's breasts with his hands, "got on top of [her]," and inserted his penis into her vagina. The victim indicated that after the parties "had sex," defendant ejaculated on her bed and said, "Wow, that was great." Defendant then put on his clothes and left through the backdoor. The victim testified that she told her sister about having sex with defendant "on the same night."

The victim's mother subsequently found defendant's wallet that contained documentation revealing defendant's age. The victim's mother testified that defendant subsequently came to their home and requested his wallet. When she informed defendant that she was going to the police, defendant responded that his relationship with the victim was "musical in nature," and he only wanted her to distribute his band's CDs. The victim's mother took the victim and defendant's wallet to the police. In her first statement to the police the victim did not indicate that anything sexual had occurred between herself and defendant. But in her second statement the victim stated that she and defendant had sexual intercourse, and she subsequently showed the police where defendant ejaculated on her bed. DNA testing on the bed sheet revealed the presence of semen, but the semen did not match a DNA sample taken from defendant.

Defendant admitted in a statement to police that he was thirty-one years old, that he flirted with the victim upon meeting her in a restaurant, and that the two participated in "cybersex" on the Internet. He also admitted that he went to the victim's house on September 14, 2003, that a female let him in through the backdoor, and that he went to the victim's upstairs bedroom. He stated that he and the victim engaged in "mutual masturbation," and that he ejaculated. Defendant denied touching the victim.

Defendant's twenty-year-old girlfriend testified that defendant called her on September 15, 2003, asked her to talk to the police, and told her what to say. In accordance with defendant's instructions she told the police that she accompanied defendant to the victim's house to give her some music CDs. Defendant's girlfriend acknowledged that she was not with defendant on the day of the incident, and that defendant asked her "to lie" about what happened that night.

II. Rape-Shield Statute

Defendant first argues that the trial court erred by denying him the opportunity to offer evidence that semen found on the victim's bed did not belong to him but belonged to two unidentified males. Defendant contends that the proposed evidence was relevant to show the source of the semen under MCL 750.520j(1)(b), and was probative of the victim's ulterior motive for making a false charge against him. We disagree.

In a pretrial motion, defendant sought to introduce evidence that the semen found on the victim's bed belonged to two unidentified males. In response, the prosecutor argued that, under the rape-shield statute, any DNA evidence showing the presence of semen should be excluded. The trial court concluded that defendant could introduce evidence that the DNA found on the sheets did not match defendant's DNA, but that defendant could not introduce evidence that the DNA belonged to two unidentified men.

This Court reviews a trial court's decision to preclude evidence under the rape-shield statute, MCL 750.520j, for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996); *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). "In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Adair*, *supra*, quoting *Hackett*, *supra*. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The rape-shield statute, MCL 750.520j provides, in part:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> * * *
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

In *Hackett*, the Court recognized that evidence prohibited by the rape-shield statute might "in certain limited situations" be "required to preserve a defendant's constitutional right to confrontation." *Hackett*, *supra* at 348. For example, "evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge." *Id.* In *Hackett*, the Supreme Court set forth specific procedures to follow when a defendant seeks to admit evidence of a rape victim's sexual conduct with others:

> The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion . . . . Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury. [*Id*. at 350-351 (citations omitted).]

Here, the trial court properly denied defense counsel's request to cross-examine the victim regarding her sexual history where defendant failed to make a credible offer of proof that the fact that the semen belonged to two unidentified males was relevant. Defendant correctly argues that the fact that the victim erroneously identified a stain on her bed as being his semen was relevant to her credibility and his defense. But defendant was not precluded from presenting evidence that the semen found on the victim's bed did not originate from him, or from arguing whatever reasonable inferences could be drawn from that evidence. In fact, the parties stipulated that defendant was excluded as a possible contributor of the semen, and the victim acknowledged

during cross-examination that she identified a location on her bed where defendant ejaculated, but that testing of her bed sheet revealed that the semen did not originate from defendant. As such, whatever exculpatory value the unidentified semen had to suggest that the victim had sexual activity with someone other than defendant, that matter was presented to the jury.

Although defendant suggests on appeal that evidence of sexual activity with others was admissible to show an ulterior motive, he does not argue what the victim's ulterior motive might have been. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Defendant has not shown that the proposed evidence that the semen was from two different males would have been relevant.

Furthermore, at best, the evidence had only marginal probative value and, because such evidence tended to suggest that the victim may have been sexually active with multiple others, it presented the type of highly prejudicial evidence that the Legislature sought to bar under the rape-shield statute. MCL 750.520j(1); *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). On this record, we cannot conclude that the trial court abused its discretion by precluding the proposed evidence.

III. Motion for Resentencing

Next, defendant argues that the trial court erred by sentencing him as an habitual offender, fourth offense, because two of his prior convictions arose from a single transaction, and therefore, he should have been sentenced as an habitual offender, third offense.

Defendant pleaded guilty to being an habitual offender, fourth offense. The sentencing guidelines range of seven to forty-six months reflected an enhancement for defendant's three prior felony convictions. The trial court sentenced defendant to a prison term of forty-six to 180 months. Defendant subsequently filed a motion for resentencing arguing, inter alia, that he should have been sentenced as an habitual offender, third offense, MCL 769.11, because two of his prior convictions arose from one transaction. The trial court denied the motion. On appeal, defendant asserts that if he were properly sentenced as a third-offense habitual offender, the appropriate sentencing guidelines range would be seven to thirty-four months.

Although defendant did not properly preserve this issue by moving to withdraw his habitual offender plea, see *People v Gaines*, 198 Mich App 130, 131-132; 497 NW2d 210 (1993), we do not consider this issue relinquished because he did challenge the validity of his status as a fourth-offense habitual offender in a motion for resentencing in the lower court. Therefore, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Multiple convictions arising out of a single transaction count as only a single prior conviction for purposes of the habitual offender statute. *People v Preuss*, 436 Mich 714, 717; 461 NW2d 703 (1990). If the convictions arise from separate criminal incidents, each conviction may be counted as a prior conviction under the statute. *Id*.

Here, the presentence investigation report (PSIR) shows that defendant has three prior adult felony convictions: (1) third-degree CSC; (2) carrying a concealed weapon; and (3)

entering a financial institution with intent to commit a felony. Defendant's convictions for CCW and entering a financial institution with intent to commit a felony arose from the same criminal episode. The PSIR indicates that the CCW conviction "involved [defendant] in a bank with a 13 inch knife and a note with the words, 'This is a stick up.'" Defendant committed both offenses on August 9, 1990. Thus, defendant's actions were contiguous in time and place. Contrary to plaintiff's claim, although defendant was convicted and sentenced by two different courts on different days, that is not a relevant consideration in determining whether the convictions arose from the same transaction. Consequently, it was error to consider the convictions as separate for purposes of establishing defendant's status as a fourth-offense habitual offender. Because the error affected defendant's sentencing guidelines range, resulting in a sentence outside the appropriate range for a third-offense habitual offender, it constitutes a plain error that affected defendant's substantial rights and, therefore, defendant is entitled to resentencing.

Within this issue, defendant argues that this case should be assigned to a different judge for resentencing because the trial judge is biased against him. Because defendant failed to move for disqualification in the trial court pursuant to MCR 2.003, this Court's review of this unpreserved issue is limited to plain error affecting substantial rights. *Carines, supra*.

In deciding whether resentencing should occur before a different judge, this Court considers (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting aside previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997). Absent actual personal bias or prejudice against either a party or a party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).

Defendant contends that the trial court's strong sentiments in denying his motion for resentencing warrant resentencing before another judge, but our review of the court's remarks reveals that there is no evidence of personal bias or prejudice required for disqualification of a trial judge. Although the trial judge summarily denied defendant's motion, there is nothing in the record to indicate that he would have substantial difficulty in setting aside previously expressed views or findings determined to be erroneous. Additionally, adverse decisions alone do not indicate bias, even if the decisions are otherwise erroneous. See *Band v Livonia Associates*, 176 Mich App 95, 116; 439 NW2d 285 (1989). Therefore, resentencing before a different judge is not required.

IV. Presentence Report

We reject defendant's claim that the trial court abused its discretion by denying his objections to inaccuracies in the PSIR. Although a sentencing court must respond to challenges to the accuracy of information in the PSIR, it has wide latitude in responding to those challenges. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). This Court reviews a trial court's response to a claim of inaccuracies for an abuse of discretion. *Id.*

MCR 6.425(A) provides that a PSIR must "depending on the circumstances, include":

(1) a description of the defendant's prior criminal convictions and juvenile adjudications,

(2) a complete description of the offense and the circumstances surrounding it,

* * *

(4) a brief social history of the defendant . . .

* * *

(10) an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report,

* * *

(12) any other information that may aid the court in sentencing.

This Court has recognized the broad scope of the PSIR:

> The presentence investigation report is an information-gathering tool for use by the sentencing court. Therefore, its scope is necessarily broad. A judge preparing to sentence a defendant may consider comments made by the defendant to the probation officer during the presentence interview in addition to evidence adduced at trial, public records, hearsay relevant to the defendant's life and character, and other criminal conduct for which the defendant has not been charged or convicted. [*Morales v Parole Bd*, 260 Mich App 29, 45- 46; 676 NW2d 221 (2003) (citations omitted).]

Because the challenged information falls within the broad spectrum of information appropriate for a PSIR, the trial court did not abuse its discretion by refusing to redact the challenged comments. The trial correctly concluded that the agent's description of the offense, which included the victim's allegations against defendant, were properly included. Further, although defendant was acquitted of third-degree CSC, a trial court was permitted to consider evidence presented at trial that defendant committed another crime even if he was acquitted of that charge. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Also, the trial court did not abuse its discretion by concluding that defendant's sexual contact with young boys as a juvenile was properly included as part of his mental health history. The court noted that the notation was made in relation to assisting in defendant's rehabilitation.

We also reject defendant's claim that he is entitled to resentencing because the trial court failed to verify on the record that he was given an opportunity to review the PSIR, and denied him the opportunity to challenge the information in the PSIR. Whether MCR 6.425(D)(2) was violated is a question of law that this Court reviews de novo. See *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002).

MCR 6.425(D)(2) provides that, at sentencing, the court must, on the record:

> (a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,
>
> (b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges[.]

Although the trial court did not specifically ask defendant whether he had the opportunity to read and discuss the PSIR, it is apparent from the discussion at sentencing that the parties had thoroughly read and considered the report. Significantly, defendant does not allege that he was not afforded the opportunity to review the report, only that the court did not verify that fact. Additionally, defendant and his counsel were given the opportunity to, and did, challenge the contents of the PSIR. In fact, after challenging several points in the PSIR, defense counsel stated, "[o]ther than that, your Honor, I don't have any further corrections to the [PSIR]." The trial court thereafter asked defendant if there was "anything [he] wish[ed] to say?" These statements belie defendant's claim that he was denied the opportunity to challenge the information in the PSIR. Furthermore, defendant raised similar objections to the PSIR in a motion for resentencing. At the hearing on the motion, the trial court recognized that "[they] went over [the PSIR] and discussed it at length." In sum, this claim is without merit.

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette